

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAGGIE'S GROCERY DELI CORP. ¹	:	DETERMINATION DTA NO. 816923
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended October 31, 1983 through October 31, 1997.	:	

Petitioner, Maggie's Grocery Deli Corp., c/o Lorenzo Martin, 601 West 180th Street, Apt. 45, New York, New York 10033, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended October 31, 1983 through October 31, 1997.

On May 4, 1999, the Division of Taxation, by its representative Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel) brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the grounds that petitioner failed to file a request for conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency. Petitioner, appearing by Lorenzo Martin,² did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for the issuance of this

¹ Petitioner's correct name is unclear. Some documents in the record use the name "Maggie's Grocery Deli Corp." while other documents use the name "Maggie Grocery Deli Corp."

² The record is silent as to the nature of Mr. Martin's relationship with respect to petitioner.

determination commenced on June 3, 1999, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest challenging a Notice of Deficiency issued by the Division of Taxation.

FINDINGS OF FACT

1. At issue on this motion is a Notice of Deficiency, dated June 15, 1998 and addressed to petitioner, Maggie Grocery Deli Corp., at 148 West 231st Street, Bronx, NY 10463-5603. This notice bears assessment number L-015125663-6, and certified mail control number P 911 203 744. The notice asserts corporation franchise tax penalty in the amount of \$14,250.00 for the fiscal years ended October 31, 1983 through October 31, 1997. The notice explains that the penalty was imposed pursuant to Tax Law § 1085(g) because petitioner failed to provide the information requested in the Division of Taxation's ("Division") correspondence.

2. Petitioner filed a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). The request form, although signed by Lorenzo Martin, is undated. The envelope in which the request form was mailed, by first class mail, bears a September 26, 1998 United States Postal Service ("USPS") postmark, and also bears a stamp indicating receipt by BCMS on September 28, 1998.

On the request form, the following entry appeared in the section to record any change of address: "Maggie Grocery Deli Corp., c/o Lorenzo Martin, 601 W. 180th St. # 45, New York, NY

10033.” The following was set forth in the request as the basis for the disagreement with the Notice of Deficiency: “*This corporation was 'S' Corporation[.] No tax due[.]*” This business was sold 5-27-97” (emphasis in the original).

3. By a Conciliation Order (CMS No. 170754) dated October 23, 1998, petitioner's request for a conciliation conference was denied on the basis that such request had been filed in excess of 90 days after the June 15, 1998 date set forth on the face of the notice.

4. On January 19, 1999, petitioner filed a petition with the Division of Tax Appeals seeking a redetermination of the deficiency issued in this matter. With respect to the timeliness of petitioner's request for a conciliation conference, the petition contains the following assertion: “[a] conciliation conference was previously requested, but it was denied due to untimely filing. Please note that this matter can probably be resolved without going to the Tax Appeal [sic] Tribunal if a Conciliation Conference is approved.” The other assertions in the petition address the merits of the case.

5. In support of its motion for summary determination, the Division submitted: its answer to the petition; an affidavit of its representative, Christina L. Seifert, Esq.; the affidavits of Geraldine Mahon and James Baisley, employees of the Division; a copy of the Division's certified mail record for June 16, 1998 entitled “ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR NON-PRESORT MAIL;” a copy of the Notice of Deficiency issued to petitioner, dated June 15, 1998, Assessment ID: L-015125663-6, certified mail control no. P 911 203 744; and a copy of the envelope which contained petitioner's Request for Conciliation Conference.

6. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's

general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

She explained that she receives a computer printout or certified mail record ("CMR") and the corresponding statutory notices, each predated with the anticipated date of mailing and each notice assigned a certified control number. The CMR for the block of notices issued on June 16, 1998, including the notice issued to petitioner, consisted of 12 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service. The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on June 16, 1998, including the notice issued to petitioner, bears certified control numbers which run consecutively from P 911 203 705 to P 911 203 833. Each page contains 11 entries, with the exception of the last page (page 12) which contains 8 entries.

In the upper left hand corner of page 1 of the CMR, the date "06/06/98" was manually changed to "6/16/98." The original date of "06/06/98" was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from "06/06/98" to "6/16/98" was made by personnel in the Division's Mail Processing Center. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative signed pages 2 and 12 of the CMR, affixed a postmark to each page of the CMR and circled "129" to indicate that the total number of pieces listed on the CMR was the total number of pieces received and mailed.

Page 4 of the CMR indicates that a Notice of Deficiency, with notice number L 015125663, was sent to "Maggie Grocery Deli Corp., 148 W 231 St., Bronx, NY 10463-5603," by certified mail using control number P 911 203 744. A U.S. postmark on each page of the CMR indicates a date of June 16, 1998.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were normal and regular procedures of the CARTS Control Unit on June 16, 1998.

7. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom"). He supervises the entire mailroom staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the mailroom in an area designated "Outgoing Certified Mail." A CMR is also received by the mailroom for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random

review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the mailroom to indicate the total number of pieces received by either circling the number of pieces received or writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employee to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS on the following day by a member of the staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

Mr. Baisley reviewed the copy of the CMR listing pieces of certified mail delivered to the Colonie Center branch office of the USPS by the mailroom staff on June 16, 1998. The review confirmed that a USPS employee signed pages 2 and 12, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 129 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit, and his personal knowledge of the procedures of the mailroom, he was able to determine that a mailroom employee delivered a piece of certified mail addressed to Maggie Grocery Deli Corp., 148 West 231st Street, Bronx, NY 10463-5603, to the Colonie

Center branch of the USPS in Albany, New York in a sealed, postpaid, windowed envelope for delivery by certified mail. Based upon his review of the CMR, he could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on June 16, 1998 for the records of the Division's CARTS Control Unit. Mr. Baisley stated that these procedures which were described in his affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed on June 16, 1998.

8. As noted above, petitioner did not respond to the motion for summary determination.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1], *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, *Matter of Service*

Merchandise, Co., Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgement must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioner in this case did not respond to the motion of the Division for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept., supra* at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461). Such evidence in this matter includes the petition and the attachments submitted with the petition (20 NYCRR 3000.9[b][1]).

C. If upon review of a taxpayer's return, the Commissioner of Taxation and Finance determines that there is a deficiency of tax, he is authorized to mail a Notice of Deficiency to the taxpayer by certified or registered mail at the taxpayer's last known address (Tax Law § 1081[a]). Such a notice becomes an assessment of tax unless a petition is filed with the Division of Tax Appeals within 90 days from the date of mailing (Tax Law § 1081[b]). Except for a limited exception, not pertinent here, the Division of Tax Appeals may entertain only those petitions which are filed within the 90-day period (Tax Law § 1089[b]). As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. The time period for filing such request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Petitioner does not contend that the Bronx, New York address to which the Notice of Deficiency was sent by the Division was incorrect nor does it allege that it did not receive the Notice of Deficiency. Accordingly, it is determined that the Division sent the Notice of Deficiency to petitioner's last known address in accordance with the provisions of Tax Law § 1081(a).

E. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must

be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon and James Baisley provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of deficiency. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the Notice of Deficiency and the certified mail record submitted as evidence of actual mailing of the notice to petitioner. The documents and affidavits also establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to petitioner. Petitioner's name and address appear on page 4 of the CMR which bears a USPS postmark of June 16, 1998. There are 129 certified control numbers listed on the 12 pages of the CMR and the USPS employee who signed the CMR on the last page thereof indicated that he or she received 129 items for mailing. The Notice of Deficiency contained the same certified control number (P 911 203 744) which was set forth on the CMR. The Division has, therefore, established that it mailed the Notice of Deficiency to petitioner, by certified mail, on June 16, 1998. Accordingly the 90-day period for the filing of petitioner's Request for Conciliation Conference commenced on June 16, 1998.

F. Tax Law § 1081(a) requires the Division to send notice by certified or registered mail when it determines that there is a corporation franchise tax deficiency. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d

667, 355 NYS2d 1028; *cf.*, *Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *aff'd* 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places risk of nondelivery on the taxpayer (*see*, *Matter of Malpica, supra*). Once the statutory notice is mailed, the taxpayer has 90 days within which to petition for a redetermination or file a request for a conciliation conference (*see*, Conclusion of Law "C").

G. As noted in Conclusion of Law "C," a Notice of Deficiency becomes an assessment unless the taxpayer files a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS within 90 days after the notice is issued. The last day on which petitioner could have timely filed the request was September 14, 1998. The Request for Conciliation Conference was mailed to BCMS on September 26, 1998 and received by BCMS on September 28, 1998. Unfortunately, this date is past the statutory 90-day period within which a request for a conciliation conference may be filed. Accordingly, the Division properly denied the request for conference and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case.

H. Finally, it is noted that petitioner is not without recourse here, for it may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 1087[a]). If its request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 1089[c]; § 170[3-a][a]; *cf. Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. The Division of Taxation's motion for summary determination is granted, and the petition of Maggie's Grocery Deli Corp. is hereby dismissed.

DATED: Troy, New York
August 26, 1999

/s/ Winifred M. Maloney

ADMINISTRATIVE LAW JUDGE